

APPLICATION FOR JUDGESHIP

4th Judicial District 2006

A. PERSONAL INFORMATION

1. Full Name: Cynthia Kegley Smith
 - a. What do you commonly go by: Cindy Smith
2. Birthdate: September 15, 1953 Are you a U.S. citizen? Yes
3. Social Security No.:
4. Home Address:
Phone:
5. Office Address: 202 W. Spruce St., Missoula, Montana 59802
Phone: (406) 541-7177
6. Length of residence in Montana: 36 Years
7. List your place of residence for the past five years:

Dates

City

State

4/86 - Present

_Missoula

Montana

B. EDUCATIONAL BACKGROUND

8. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Hellgate High School	Missoula MT	1971	High School
University of Montana	Missoula MT	1987	B.A., Political Science, with High Honors
University of Montana	Missoula MT	1990	J.D., with High Honors
Trial Lawyers College	Dubois WY	2004	Graduate
Harvard Law School Program on Negotiation, Mediation Training	Cambridge MA	2005	Graduate

9. List scholarships, awards, honors and citations you have received (Eagle Scout, Book Awards, Boy's or Girl's State, etc.)

1986-87 ASUM Student Senate

1989-90 National Moot Court, Regional Finalist, National Semi-Finalist

1990 American Jurisprudence Book Award, Family Law

1990 Order of Barristers

1999 State Bar of Montana Distinguished Service Award

10. Were you a member of the Law Review Board? If so, please state the title and citation of any article which was published and the subject area of the article.

I was first a member and then an editor of the Montana Law Review. I published a comment on changes in Workers' Compensation law. The citation is: Comment, 1987 Changes to Lump Sum Payment Provisions in the Montana Workers Compensation Act, 50 Mont. L. Rev. 2 (1989).

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

11. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana Supreme Court	1990
United States District Court	1990
United States Ninth Circuit	1992
Court of Appeals	
United States Supreme Court	1998

12. Indicate your present employment (list professional partners or associates, if any).

Cynthia K. Smith, P.C. (solo practitioner)

13. State the name, dates and addresses of all law firms with which you have been associated in practice, and of all governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
United States District Court	Law Clerk to the Hon. Charles C. Lovell	6/90 - 6/91
Williams & Ranney, P.C.	Associate	6/91 - 12/94
Cederberg, Shott & Smith, P.C.	Partner	1/05 - 12/00
Smith Law Offices, P.C.	Sole Practitioner	1/01 - 10/03
Smith Jewell PLLP	Partner	10/03 - 7/05
Cynthia K. Smith, P.C.	Sole Practitioner	7/05 - Present

14. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

I have been employed continuously since graduation from law school. I began my federal clerkship the Monday following my law school graduation, and studied for the bar exam while working full time.

15. Describe the nature of your present law practice, listing the major types of law you practice and the percentage each constitutes of your total practice.

Personal Injury	35%
Commercial Litigation	10%
Criminal Defense	30%
Family Law	10%
Employment Law	10%
Wills and Probate	5%

16. List other areas of law in which you have practiced, including teaching, lobbying, etc.

I lobbied briefly in the Montana Legislature in 1999 against proposed censorship laws.

17. If you specialize in any field of law, what is your specialty?

I have special knowledge and experience in both civil and criminal trial and appellate work, in a number of different areas. I have testified as an expert in insurance law and professional ethics. Also, I have advanced training and experience in mediation.

18. Do you regularly appear in court? Yes

What percentage of your appearance in the past five years were in:

Federal Court	<u>49</u>	%
State or local courts of record	<u>50</u>	%
Administrative bodies	<u>1</u>	%
Other	<u> </u>	%

19. During the past five years, what percentage of your practice has been trial practice? 90 %

20. How frequently have you appeared in court? I appear in court four times per month on average.
21. How frequently have you appeared at administrative hearings? I have appeared in administrative hearings about .25 times per month on average.
22. What percentage of your practice involving litigation has been:
- | | | |
|----------|----|---|
| Civil | 70 | % |
| Criminal | 30 | % |
| Other | 0 | % |
23. Have you appeared before the Montana Supreme Court within the past five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

In the past five years, I have appeared before the Montana Supreme Court in three cases. The most recent was a religious dispute between two factions of a religious organization, and the issue was whether the district court had subject matter jurisdiction over the parties' dispute. The one before that was a property boundary dispute, and the other was a personal injury case in which workers' compensation exclusivity was the dispositive issue.

A list of my five most recent cases is attached as Exhibit A.

24. State the number of jury trials you have tried to conclusion in the past ten years. Five. A sixth is scheduled on March 28, 2006.

25. State the number of non-jury trials you have tried in the past ten years. Two non-jury trials and one arbitration.

26. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

A list of my primary cases from the past two years is attached as Exhibit B.

27. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have litigated two wage and hour claims before the Montana

Department of Labor and Industry on behalf of plaintiffs. I litigated two unemployment claims before the Montana Department of Labor and Industry, one for a plaintiff and one for a defendant. I also litigated two claims before the Montana Human Rights Bureau, one for a plaintiff and one for a defendant. I have also litigated two social security disability claims before the Social Security Administration.

28. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at Continuing Legal Education seminars or otherwise, please state the date, topic and group to which you spoke.

I have written CLE materials and lectured on legal issues at the following Continuing Legal Education Seminars:

National Business Institute, 1996: Insurance Coverage Law in Montana. I wrote the materials for and lectured on "Litigating the Insurance Claim" and "Extra-Contractual Liability."

National Business Institute, 1999: Defending Wrongful Discharge Claims Under Montana Law. I wrote the materials for and lectured on "Employment-Related Torts."

National Business Institute, 2002: Insurance Coverage Law in Montana. I wrote the materials for and lectured on "Third Party Coverage," "Litigating the Insurance Claim" and "Extra-Contractual Liability."

D. PROFESSIONAL AND PUBLIC SERVICE

29. List all the bar associations and legal professional societies of which you are a member and give the titles and dates of any office you have held in such groups, and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

State Bar of Montana, 1990 to Present

President, Young Lawyers' Section, 1993

Chair, Judicial Relations Committee, 1995-1999

Chair, Ethics Committee, 2005 - Present

Member, Board of Trustees, 1998 - Present

Member, Professionalism Committee, 2005 - Present

Western Montana Bar Association, 1991 to Present

President, 1998

Montana Trial Lawyers Association, 1991 to Present

Montana Association of Criminal Defense Lawyers, 2005 to Present

National Association of Criminal Defense Lawyers, 2005 to Present

30. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the past five years. Please state the title and date of any office you have held in each such organization. If you held any offices, please describe briefly your activities in the organization.

Missoula Sunrise Rotary

Missoula Business Women's Network

Missoula YWCA

Board of Directors, 2005 - Present

31. Have you ever run for, or held, public office? If so please give the details.

I am currently a candidate for District Judge for the Montana Fourth Judicial District Court, Department 2. This is my first time as a candidate for public office.

E. HEALTH RECORD

32. Do you have any disabilities or impairments that might interfere with your performance of the duties of a judge? If so, please explain.

I do not have any disabilities or impairments that might interfere with my performance of the duties of district judge.

F. PROFESSIONAL CONDUCT AND ETHICS

33. Have you ever been disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

I have never been disciplined for a breach of ethics or for unprofessional conduct by any court, administrative agency, bar association or other professional group. I have never had a Rule 11 violation alleged against me. I have never had a complaint made against me to the Commission on Practice of the State of Montana or the Office of Disciplinary Counsel.

34. Do you know if any proceeding is pending against you before any court, the Commission on Practice of the State of Montana, Judicial Standards Commission, or by any administrative agency or disciplinary committee? If so, give the particulars.

I know of no proceedings pending against me in any court, the Commission on Practice of the State of Montana, the Judicial Standards Commission, or any administrative agency or disciplinary committee.

35. Have you ever been found guilty of contempt of court, or sanctioned by any court for any reason? If so, please explain.

I have never been found guilty of contempt of court or sanctioned by any court for any reason.

36. Do you disagree with any of the Canons of Judicial Ethics applicable to Montana Judges? If so, please explain.

I do not disagree with any of the Canons of Judicial Ethics applicable to Montana Judges.

37. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations for which a fine of \$100 or less was imposed unless it also included a jail sentence.

I have never been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance.

38. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, please give the particulars, including the amounts involved.

I have never had a professional malpractice claim made against me.

39. Have you ever been found guilty in any civil or criminal proceedings with conduct alleged to have involve moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

I have never been found guilty in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct.

40. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court, that would affect adversely your qualifications to serve on the court for which you have applied? If so, please explain.

There are no circumstances or events in my personal or professional life that would affect adversely my qualifications to serve as a district court judge.

G. BUSINESS AND FINANCIAL INFORMATION

41. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

Since being admitted to the Bar, I have not engaged in any occupation, business or profession other than the practice of law.

42. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of such business, its nature, and the nature of your duties. State whether you intend to resign such position immediately upon your appointment to a judicial office.

I am a shareholder and officer of Caras Park Place, LLC, which owns an office building in downtown Missoula. The building is currently rented to two law firms and an investment firm. I am attempting to sell my interest in the corporation and would resign as an officer immediately upon my appointment to judicial office.

I am also a partner with my husband in 202 West Spruce, LLP, which is a partnership that owns the office building in which my law office is located. We will sell the building if I am appointed to judicial office.

43. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, please identify the source and the approximate percentage of your total income it constituted over the past five years.

I have not received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization.

44. Do you have any financial interests, investments or retainers which might conflict with the performance of your judicial duties, or which in any manner or for any reason might embarrass you? If so, please explain.

I do not have any financial interests, investments or retainers that might conflict with the performance of my judicial duties or that in any manner or for any reason might embarrass me.

45. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? X Yes _____No

If not, Please explain. N/A

46. Do you have any liens or claims outstanding against you by the Internal Revenue Service? _____ Yes X No

If yes, please explain. N/A

47. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five (5) years? If so, please give details.

I have never been found by the IRS to have willfully failed to disclose properly my income.

48. Please explain your philosophy of public involvement and practice of giving your time to community service.

I believe it is important to participate in and give back to my community, my profession and my alma mater. Every year I donate time to the law school, by judging student trials and competitions, and speaking at student functions. For three years I coached the University of Montana ABA Moot Court Team.

I have given back to the profession through involvement with state and local bar activities throughout my legal career. I currently serve on the Montana State Bar Board of Trustees, the Ethics Committee, and the Professionalism Committee.

I currently serve my community through membership on the board of directors of the YWCA of Missoula, the Missoula Writing Collaborative, and Montanans Against Censorship. I also served my community in the past two years by assisting the Missoula County Public Defenders Office in representing indigent defendants. I volunteered to assist prior to the time that the Fourth Judicial District Court judges required Missoula County lawyers to accept appointments from the public defender's office.

I also believe it is important for members of the bar to provide pro bono representation for indigent and low-income individuals. Moreover, I believe it is important for judges to be involved in the implementation of pro bono and low-income representation programs. It is unfortunate but true that some lawyers are more likely to honor their obligation to provide assistance to indigent individuals when they know that their participation in this type of program is being encouraged and noticed by the judiciary.

H. WRITING SKILLS

49. In the last five years, explain the extent you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

I do my own research on legal issues and write my own briefs. In the past five years, I have researched and written briefs for motions to dismiss, motions for summary judgment, motions to compel discovery and to quash, and appellate briefs, in the following types of cases: Negligent injury to persons and property, real estate, insurance, class action, wrongful discharge, employment discrimination, wage and hour law violations, workers compensation exclusivity, racial discrimination, property boundary disputes, contract disputes, fraud, and criminal defense. I have also researched and written briefs on constitutional issues involving freedom of religion and freedom of expression.

50. If you have engaged in any other types of "legal writing" in the last five years, such as drafting documents, etc., please explain the type and extent of writing you have done.

In the last five years, I have drafted complaints and answers in civil cases. I have drafted wills, contracts, partnership agreements, articles of incorporation, and corporate bylaws. I have drafted releases in cases that have settled. I have drafted jury instructions in cases that have gone to trial before juries and Findings of Fact and Conclusions of Law in cases that have been tried to a judge or arbitrator.

51. Please attach a writing sample of no more than ten pages which you have written yourself. A portion of a brief or memorandum is acceptable.

Attached as Exhibit C is a successful motion and brief filed in a property boundary dispute case. The attachments referenced in the brief are not attached to the writing sample.

52. What percentage of your practice for the last five years has involved research and legal writing? 35 %
53. Are you competent in the use of Westlaw and/or Lexis?

I am competent in the use of both Westlaw and Lexis.

I. MISCELLANEOUS

54. Briefly describe your hobbies and other interest and activities.

I enjoy playing with my grandchildren, reading both fiction and non-fiction, gardening, and crossword puzzles. I am also currently trying to improve my ability to speak Spanish.

55. Describe the jobs you have held during your lifetime:

In high school, I worked at a laundry and also did babysitting. I married and had my first child when I was 18 years old. For the next twelve years, I was primarily a homemaker, although I did childcare in my home and worked in a day care center during that time period. I started college at 30, when I had three children. During law school, I worked as an intern for three different law firms and also worked as a teaching assistant, teaching legal research and writing.

56. Please identify the nature and extent of any pro bono work that you have personally performed during the past five years.

During the past five years, I represented a mentally handicapped man in a landlord/tenant dispute. I assisted a physically disabled woman in obtaining a divorce from her abusive husband. I represented a woman who was terminated from her employment with a federal agency. I have also provided pro bono legal assistance to the Missoula Writing Collaborative, the Clark Fork Coalition and Blue Mountain Clinic. I am currently involved in three pro bono cases. In the first case, I am acting as Guardian ad Litem for a six-year-old boy. In the second, I am the attorney for the father of a developmentally disabled woman. The father is seeking appointment as the young woman's conservator and guardian. In the third case, I represent a mother in a child custody dispute.

57. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

The event that most influenced my view of the justice system occurred during my first year of private practice. I represented indigent defendants through participation on the federal Criminal Justice Act (CJA) Panel. The first time I met with a CJA client, she was locked in a holding cell waiting for her initial appearance. I had to go inside and be locked up with her in order to meet her and give her advice. That was the first time I truly understood the meaning of the word "liberty." I realized through that experience and through representation of other individuals the importance and fragility of our civil rights.

The people who have most influenced my view of the justice system are Justice of the Peace Karen Orzech, Magistrate Judge Bart Erickson, Judge Donald Molloy and Judge Charles Lovell. They are all judges upon whom I would model my judgeship.

I admire Judge Orzech because she cares about what happens to the criminal defendants who come before her, and is always looking for ways to improve the criminal justice system in a way that can either prevent criminal conduct or better rehabilitate those who have already broken the law.

I admire Judge Erickson for the fact that he is hardworking, down-to-earth, humorous when appropriate, and respectful to all litigants and counsel.

I admire Judge Molloy because he has the ability to move cases quickly through his court, without compromising the thorough attention he must give to each case. He strictly adheres to the rules of civil and criminal procedure and expects counsel to do the same. He is fair and courteous to all counsel and respectful to litigants.

I admire Judge Lovell because, as his law clerk, I saw first-hand the thought and careful deliberation he put into every case he decided, especially cases in which he had to sentence criminal defendants to lengthy sentences.

58. In the space provided, explain the qualities which you believe to be most important in a good judge.

A good judge is hard working, impartial, fair, even-tempered,

decisive, and respectful to all parties and their counsel. It is also important for a judge to remember that she is a human being. She should be willing to show her humanity to counsel and litigants.

A good judge also follows closely the rules of judicial ethics. To preserve the public's faith in the judiciary, a judge should always strive to avoid even the hint of impropriety. Unfortunately, this sometimes makes for a lonely judge, because many of her friends are attorneys. Nevertheless, she must avoid any *ex parte* or other contact that would give rise to doubts about her impartiality.

Finally, it is important for a judge to think and act independently. A judge should be willing and able to make unpopular decisions if the law requires them.

59. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

A court should follow precedent when it is available; however, it would be rare to find a case that is exactly on all four corners with a prior reported case. When there is not statutory or case law that compels the court's decision, the court must do its best to predict the way the Montana Supreme Court would decide the issue.

The need for flexibility arises when new situations or new developments show that existing precedent does not adequately resolve or address the dispute before the court. In that circumstance, a court should examine the public policy underlying the existing law and fashion a remedy that complies as closely as possible with existing precedent and takes into account the public policy underlying the precedent.

60. In the space provided, state the reasons why you are seeking judicial office. Please indicate whether the judicial salary will be an increase or decrease over in your current gross income.

I am seeking judicial office because it is an opportunity to serve the public and make a difference to people in a capacity for which I am especially well suited. I am hard working, patient, even tempered, and I have a broad base of experience. I have worked on nearly every kind of case that would come before me as a district judge.

As to the salary comparison, my income has varied significantly over the past few years because a substantial portion of my practice has involved contingency fee cases. In some years my salary exceeded the salary of a district judge and in some years it did not. The current judicial salary would be an increase over my gross income from last year.

61. What items or events in your career have distinguish you or of which you are most proud.

I am proud of the fact that my legal experience is broad and diverse. Throughout my career I have primarily represented people and small business owners who had little experience with or knowledge of the legal system. I was their "key to the courthouse," a responsibility that I have taken seriously.

I am most proud of my cases that made a difference in the way my clients were treated. The following are just a few examples:

(1) I represented a mentally and physically handicapped man who was being harassed by creditors who called him a "retard" and threatened to have him put in jail if he did not pay a disputed debt within 72 hours. He felt vindicated when he was able to tell his story to a judge and receive an award of compensatory and punitive damages against the debt collector.

(2) I brought a class action case that caused an insurance company to voluntarily change its practices in subrogation claims against its own insureds.

(3) I helped a physically handicapped woman obtain a divorce from an abusive husband who frightened her so badly she was afraid to use her address in her pleadings.

Finally, I am also proud of the fact that I gave an opposing party plaintiff the courage to dismiss her complaint against my client, because in her deposition I had treated her with more dignity and respect than she had received from her own attorney, who would not listen to her desire to stop the litigation.

62. State any pertinent information reflecting positively or adversely on you which you believe should be disclosed to the Judicial Nomination Commission.

I can't think of anything that should be disclosed to the nomination commission that hasn't been disclosed.

63. Is there any comment you would like to make that might differentiate you from other applicants or that are unique to you that would make you the best judicial candidate?

I have a breadth of experience that the other applicants may not have. I have practiced both civil and criminal litigation, in a wide variety of cases. In addition to criminal defendants, I have represented blue-collar workers, minimum wage earners, and mentally and physically handicapped individuals.

In just the past year, my cases have included representation of a physically and mentally handicapped man in a Fair Debt Collection Act claim; property owners whose property was contaminated by arsenic-laden coal mine tailings; several individuals who were injured

in car wrecks; individuals who were injured on the job; a small business being sued over a construction project; a small business being sued over a repair project; a woman whose child was taken from her by her boyfriend; a small business being sued over damage during transportation of a piece of equipment; several people who were discharged from their jobs; a small business being sued for discrimination; a woman who was not paid all of her earnings by her previous employer; and a young man who was shot in the arm by a friend.

Because of the variety and breadth of my legal experience, I would not have the learning curve that would face a new judge who has practiced only criminal law during the vast majority of his or her career.

For the past eleven years I have been a small business owner, running a law firm either as a partner in a law firm or as a solo practitioner. I understand what private attorneys go through as they seek to provide competent representation for their clients.

I have been in the trenches, and I know what it is like to represent individuals and companies who need a timely resolution to their conflicts. I know the emotional and financial toll that litigation takes on the average person. I understand the cost of hiring expert witnesses. I know the despair that parents feel when they cannot get a hearing to resolve their custody battles. I understand that average people need to have peaceful and timely resolutions of their disputes so that they can move on with their lives.

I have conducted numerous settlement conferences during my career, and have had extensive mediation training. I have a talent for empathetic listening and creative problem solving.

Other than the year I spent as a federal law clerk, I have always worked in a private firm. Private practice is not 8 to 5, with benefits. It is 8 to whenever I get the days' work done. I have embraced the private practice lifestyle, and I will bring that lifestyle and work ethic to the bench.

I am a high energy individual who could bring a different perspective to the bench than is available today in the Fourth Judicial District Court. I have worked with individual clients throughout my career and have had to explain the law to them in a layperson's terms. I would like to bring those years of experience and wisdom to the bench.

J. CERTIFICATE OF APPLICANT

I understand the submission of this application expresses my willingness to accept appointment to the Judiciary of the State of Montana, if tendered by the Governor of the Montana Supreme Court, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Canons of Judicial Ethics, if appointed.

(Date)

(Signature of Applicant)

EXHIBIT A

The following are my five most recent cases filed before the Montana Supreme Court:

Second International Baha'i Council v. Neal Chase

326 Mont. 60, 106 P.3d 1168 (2005)

Opposing Counsel: K. Michael Sol
SOL & WOLFE
101 E. Broadway, #300
Missoula MT 59802
(406) 728-4727

Roy v. Blackfoot Telephone Cooperative

324 Mont. 30, 101 P.3d 301 (2004)

Opposing Counsel Kelly Wills
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula MT 59807
(406) 523-2500

Kohler v. Croonenberghs et al.

317 Mont. 413, 77 P.3d 531 (2003)

Opposing Counsel: Greg Schultz
210 E. Pine St., Ste. 200
Missoula MT 59802
(406) 543-7259

Gary Graham
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula MT 59807
(406) 523-2500

Ray Tipp and Rich Buley
TIPP & BULEY
P.O. Box 3778
Missoula MT 59807
(406) 549-5186

Solle v. Western States Ins. Co.

299 Mont. 237, 999 P.2d 328 (2000)

Opposing Counsel: Candace Fetscher and Lucy France
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula MT 59807
(406) 523-2500

Blackburn v. Blue Mountain Women's Clinic

286 Mont. 60, 951 P.2d 1 (1997)

Opposing Counsel: Robert Kelleher, Sr.
P.O. Box 397
Butte MT 59703
(406) 782-7408

EXHIBIT B

Wilson v. Big Sky Carvers, LLC

DV-05-224

No trial date has been set.

Opposing Counsel: Robert Lukes
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula MT 59807
(406) 523-2500

Presiding Judge: Hon. Mike Salvagni
615 S. 16th Ave.
Bozeman MT 59715
(406) 582-2150

McLaughlin v. Powell

87-678

The case settled in August of 2005.

Opposing Counsel: Susan Moriarity Miltko
WILLIAMS LAW FIRM
P.O. Box 9440
Missoula MT 59807
(406) 721-4350

Presiding Judge: Hon. Douglas Harkin
Fourth Judicial District Court
200 W. Broadway
Missoula MT 59802
(406) 258-4774

Dent et al. v. ASARCO

CV-02-65-M-DWM

Rapier v. ASARCO

CV-02-67-M-DWM

Trial Date: October 2004

Opposing Counsel: Don Robinson and Ron Thuesen
POORE, ROTH & ROBINSON
P.O. Box 2000
Butte MT 59702
(406) 497-1200

Presiding Judge: Hon. Donald W. Molloy

United States District Court
P.O. Box 7309
Missoula MT 59807
(406) 542-7286

It's All by Design, Inc. et al v. Blakeslee et al.

DV-02-1054

No trial date has been set.

Opposing Counsel: Steve Carey
P.O. Box 8659
Missoula MT 59807
(406) 728-0011

Presiding Judge: Hon. Ed McLean
Fourth Judicial District Court
200 W. Broadway
Missoula MT 59802
(406) 258-4771

Brooks v. CRS Hardware Corp.

DV-02-242

No trial date has been set.

Opposing Counsel: Dan Spoon
P.O. Box 8869
Missoula MT 59807
(406) 541-2000

Presiding Judge: Hon. Deborah Kim Christopher
Twentieth Judicial District Court
106 Fourth Ave. E.
Polson MT 59860
(406) 883-7360

Kohler v. Croonenberghs et al.

DV-99-88142

The case settled in 2004.

Opposing Counsel:

Greg Schultz
210 E. Pine St., Ste. 200
Missoula MT 59802
(406) 543-7259

Gary Graham
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula MT 59807
(406) 523-2500

Ray Tipp
TIPP & BULEY
P.O. Box 3778
Missoula MT 59807
(406) 549-5186

Presiding Judge: Hon. John Henson
Fourth Judicial District Judge
200 W. Broadway
Missoula MT 59802
(406) 258-4772

U.S. v. Kohl

CR-04-27-M-DWM

Trial Date: December 2004

Opposing Counsel: Joshua Van de Wetering
Assistant U.S. Attorney
P.O. Box 8329
Missoula MT 59807
(406) 829-3326

Presiding Judge: Hon. Donald W. Molloy
United States District Court
P.O. Box 7309
Missoula MT 59807
(406) 542-7286

McGraw v. Mendenhall

DV-00-998

The case settled in December 2005.

Opposing Counsel: Chuck McNeil and Kevin Twidwell
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula MT 59807
(406) 523-2500

Presiding Judge: Hon. Ed McLean
Fourth Judicial District Court
200 W. Broadway
Missoula MT 59802
(406) 258-4771

U.S. v. Rosales

CR-05-37-M-DWM

Trial Date: October 2005

Opposing Counsel: Paulette Stewart
Assistant U.S. Attorney
901 Front St., Ste. 1100
Helena MT 59626
(406) 457-9352

Presiding Judge: Hon. Donald W. Molloy
United States District Court
P.O. Box 7309
Missoula MT 59807
(406) 542-7286

Gibson v. Lenahan et al

CV-04-101-M-DWM

Trial Date: December 2005

Opposing Counsel: Bruce Spencer
SMITH LAW FIRM
P.O. Box 1691
Helena MT 59624
(406) 442-2980

Presiding Judge: Hon. Donald W. Molloy
United States District Court
P.O. Box 7309
Missoula MT 59807
(406) 542-7286

Montana Office Machines of Missoula v. Allied Van Lines et al.

CV 05-109-M-DWM

Trial Date: February 2007

Opposing Counsel: Chris Nygren
MILODRAGOVICH, DALE, STEINBRENNER &
BINNEY
P.O. Box 4907
Missoula MT 59806
(406) 728-1455

Jack Jenks
PHILLIPS & BOHYER
P.O. Box 8569
Missoula MT 59807
(406) 721-7880

Paul Meisner and Karen Novatney
MEISNER & ASSOCIATES
P.O. Box 8989
Missoula MT 59807
(406) 829-1766

Steve Lehman
CROWLEY LAW FIRM
P.O. Box 2529
Billings MT 59103
(406) 252-3441

Presiding Judge: Hon. Donald W. Molloy
United States District Court
P.O. Box 7309
Missoula MT 59807
(406) 542-7286

U.S. v. Ramos

CR-05-143-GF-SHE

Trial Date: March 28, 2006

Opposing Counsel: Lori Harper Suek
Assistant U.S. Attorney
P.O. Box 1478

Billings MT 59103
(406) 247-4645

Presiding Judge:

Hon. Sam E. Haddon
P.O. Box 1529
Great Falls MT 59403
(406) 727-7011

1 Cynthia K. Smith
2 SMITH JEWELL PLLP
202 W. Spruce St., P.O. Box 7785
3 Missoula, Montana 59807-7785
4 (406) 541-7177
5 *Attorney for Plaintiffs*
6
7
8
9

10 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

11 Dale T. Kohler and Jeanne M. Kohler,

12
13 Plaintiffs,

14 vs.

15
16 Albert A. Croonenberghs, Rose S.
17 Croonenberghs, Commonwealth Land and Title
18 Insurance, and FLR Partnership, LLP, d/b/a
Lambros Real Estate,

19 Defendants.

Department No. 2
Hon. John Henson
Cause No. DV-99-88142

**MOTION TO ENFORCE
SETTLEMENT AGREEMENT**

20 COME NOW Plaintiffs Dale and Jeanne Kohler, by and through counsel
21 of record, and move the Court to enforce the settlement agreement entered between
22 Plaintiffs and Defendants Albert and Rose Croonenberghs on July 8, 2004. The
23 Kohlers also seek interest on the agreed settlement amount, and attorneys' fees and
24 costs incurred in attempting to enforce the agreement.
25
26

27 This motion is made on the grounds that the Kohlers and Defendants

1 Croonenberghs entered into an unconditional settlement agreement during a
2 settlement conference conducted by the Hon. Gordon Bennett. Since that time, the
3 Kohlers have fulfilled their obligations under the settlement agreement, but the
4 Croonenberghs, through their counsel, Ray Tipp, have unreasonably and vexatiously
5 refused to fulfill their obligations. This motion is supported by the following brief.
6
7

8 The undersigned has contacted counsel for the Croonenberghs and he is
9 opposed to this motion.

10 **BRIEF IN SUPPORT OF MOTION**

11 **A. Background Facts.**

12 This case involves a dispute over the boundary between two properties
13 in East Missoula. This Court resolved the boundary dispute in September of 2002,
14 when it issued a partial summary judgment holding that the boundary was established
15 in 1976 by a boundary agreement signed by the Croonenberghs and the Kohlers'
16 predecessors in interest, C.B. and Erma Lewis. (Opinion and Order, September 9,
17 2002). This Court certified the partial summary judgment as final. The
18 Croonenberghs appealed, and the Montana Supreme Court remanded for disposition
19 of the remaining claims.
20

21 After many attempts to schedule a settlement conference, the parties
22 finally held a settlement conference before the Hon. Gordon Bennett on July 8, 2004.
23

24 A copy of the settlement agreement is attached as Exhibit A. Plaintiffs Dale and
25 Jeannie Kohler were present with their attorney, Cynthia Smith. (Affidavit of Dale
26
27

1 Kohler, ¶ 5). Defendant Rose Croonenberghs attended the settlement conference
2 individually, and as the representative of her husband, Albert Croonenberghs, through
3 a power of attorney he had given to her. (Id., ¶ 6). Ray Tipp was present on behalf of
4 the Croonenberghs. (Id., ¶).

6 Both sets of parties negotiated during the settlement conference. (Id., ¶
7 7). The parties signed an agreement (hereinafter “Agreement”), which stated that the
8 common boundary between their properties was the original fence line, as it was
9 erected by C. B. Lewis. (Exhibit A, ¶ 2). For purposes of this brief, the location of
10 the fence will be referenced as the “Lewis Fence Line”.
11

13 The Croonenberghs tore down a portion of the fence erected by C. B.
14 Lewis after the case at bar was filed, and only parts of the fence existed when the
15 parties signed the Agreement. (Affidavit of Dale Kohler, ¶ 8). Thus, as part of the
16 Agreement, the parties agreed that “on July 13, 2004,” they would “monument the
17 easterly and westerly terminus pointes of the CB Lewis fence line” and that “the line
18 between the two terminus points are [sic] agreed to be the common boundary.”
19 (Exhibit A, ¶ 1). The parties agreed to exchange quit claims deeds that were in
20 accord with the Agreement. (Id.). The Croonenberghs agreed to pay the Kohlers
21 \$9,000 upon exchange of the quitclaim deeds. (Id., ¶2).

25 Pursuant to the terms of the agreement, Dale Kohler met with the
26 Croonenberghs’ designated agent, Tony Croonenberghs, on July 13, 2004, at the
27 boundary of the Kohler/Croonenbergh properties. (Affidavit of Dale Kohler, ¶ 9).

1 Kirk Adkins, a surveyor with WGM, Inc., was present also. (Id.; Affidavit of Kirk
2 Adkins, ¶ 2). Mr. Adkins observed Dale Kohler and Tony Croonenberghs determine
3 the easterly and westerly terminus points of the Lewis Fence Line. (Affidavit of Kirk
4 Adkins, ¶ 3). Mr. Adkins surveyed the agreed-upon terminus points and documented
5 the terminus points and the line between them in a Boundary Line of Agreement
6 Exhibit dated July 13, 2004. (Id., ¶ 4, and Attachment 1 thereto). Mr. Adkins
7 subsequently prepared another Boundary Line of Agreement Exhibit dated November
8 11 2004, which contained an exact legal description of the Lewis Fence Line. (Id., ¶
9 5, and Attachment 2 thereto).

10
11
12
13 Since the July 13, 2004, meeting between Dale Kohler and Tony
14 Croonenberghs, the Kohlers have repeatedly provided the Croonenberghs with
15 proposed quit claim deeds that exactly describe the boundary line documented in the
16 field by Mr. Kohler and Mr. Croonenberghs. (Copies of the correspondence between
17 the Kohlers' counsel and Ray Tipp are attached as Exhibit B). The Croonenberghs,
18 through their counsel, Ray Tipp, have repeatedly responded with proposed quitclaim
19 deeds that ignore the boundary line in the Agreement and attempt to change the terms
20 of the Agreement. (Exhibit B).

21
22
23 Specifically, Mr. Tipp's proposed quitclaim deeds each contain a
24 property description that purports to describe the Lewis Fence Line by measuring the
25 distance between it and "Lot E." Unfortunately, there is no recorded or recordable
26 survey that provides a legal description of the boundary of Lot E. The exact legal
27

1 parameters of Lot E are unknown. The survey that Mr. Tipp is attempting to use to
2 designate Lot E was drafted in the 1960's and never recorded. The surveyor who
3 prepared it, Robert Shelton, is deceased.
4

5 Lot E is simply not a boundary that can be used for a legal description of
6 the Lewis Fence Line. The vagueness of Lot E's boundary is presumably at least one
7 of the reasons for the 1976 boundary line agreement that was signed by the
8 Croonenberghs and Kohler's predecessor in interest, Erma Lewis.¹ If the parties were
9 to sign the quitclaim deeds proposed by Mr. Tipp, they would be again embroiled in
10 boundary line litigation like this case as soon as one of the parties sold their property.
11
12

13 **B. Argument.**

14 **1. An Unconditional Settlement Agreement is Valid and** 15 **Enforceable.**

16 An unconditional settlement agreement is valid and enforceable through
17 a motion to enforce the agreement. *Bar OK Ranch Co. v. Ehlert*, 40 P.3d 378, 385
18 (Mont. 2002). In *Bar OK Ranch*, the parties held a settlement conference and signed
19 a memorandum of understanding. When one party refused to perform, the other
20 moved to enforce the settlement agreement. The district court entered judgment
21 enforcing the agreement, and on appeal, the Montana Supreme Court held that, so
22 long as the parties attended and negotiated at a settlement conference, a resulting
23 unconditional settlement agreement was valid and enforceable. *Id.*
24
25
26
27

¹ This Court found the 1976 boundary line agreement to be valid and enforceable in its opinion

1 In this case, the parties attended the settlement conference with their
2 counsel, and negotiated the terms of the settlement agreement. They entered into an
3 unconditional agreement. (Exhibit A).
4

5 The Kohlers performed their obligations under the Agreement by
6 meeting in the field with Tony Croonenberghs, and agreeing on the exact location of
7 the Lewis Fence Line. The Kohlers went even further and had a surveyor witness the
8 agreement on the fence line location and prepare an exhibit showing its exact location
9 on the ground. The Kohlers then provided the Croonenberghs with proposed
10 quitclaim deeds that exactly set out the legal description of the agreed-upon location
11 of the Lewis Fence Line.
12
13

14 The Croonenberghs only partially performed, when Tony
15 Croonenberghs met with Dale Kohler in the field to document the terminus points of
16 the CB Lewis Fence line. The Croonenberghs have refused to further perform,
17 however. They refuse to sign quitclaim deeds that describe the Lewis Fence Line, as
18 they agreed to do in the Agreement. They also have refused to pay the settlement
19 funds as agreed.
20
21

22 Croonenberghs may argue that they should not be required to sign a quit
23 claim deed that extends as far west as the westerly terminus point of the Lewis Fence
24 Line, because they may have never claimed ownership to land extending that far west.
25 They may contend, as Mr. Tipp has in the letters attached to this brief, that they
26
27

1 cannot quit claim land to which they have never claimed an interest. That argument
2 should not preclude the Court from ordering the Croonenberghs to quit claim to the
3 Kohler's any land lying south of the Lewis Fence Line. The Kohlers are not aware of
4 any law or fact that would prejudice the Croonenberghs for quitclaiming any interest
5 they may have in any property, whether or not they had ever claimed an interest in
6 such property.
7

8
9 Under Bar OK Ranch, the Kohlers are entitled to judicial enforcement of
10 the terms of the settlement agreement. The Kohlers therefore respectfully request that
11 the Court grant their Motion to Enforce Settlement Agreement.
12

13 **2. The Croonenberghs' Counsel has Unreasonably and Vexatiously**
14 **Increased the Litigation in this Case, and should be Required to**
15 **Compensate the Kohlers for their Additional Attorneys' Fees and**
16 **Costs.**

17 As a result of the Croonenberghs' refusal to perform, Dale Kohler has
18 had to incur additional attorneys' fees and surveyor fees of the Croonenberghs'
19 blatant refusal to follow the clear terms of the agreement. (Affidavit of Dale Kohler,
20 ¶ 11). Croonenberghs' counsel, Ray Tipp, has unreasonably and vexatiously
21 increased the litigation in this case by ignoring the terms of the settlement agreement
22 and attempting to insert new terms into it.
23

24 In Montana, the district court has discretion to award attorneys' fees and
25 costs to a party when the attorney for the opposing party has unreasonably multiplied
26 court proceedings. § 37-61-421, M.C.A.; *In the Matter of the Estate of Bayer*, 21
27

1 P.3d 3, 5 (Mont. 2001). In *Bayer*, an attorney who purported to represent a protected
2 person refused to provide documents to the protected person's conservator. The
3 district court found, and the Montana Supreme Court affirmed, that this conduct
4 unreasonably multiplied litigation expenses, and awarded attorneys' fees to the
5 conservator. *Id.*

6
7
8 In this case, as in *Bayer*, the conduct of Croonenberghs' counsel has
9 unreasonably multiplied the Kohlers' expenses and attorneys' fees. The
10 Croonenberghs agreed to exchange quitclaim deeds in conformance with their
11 agreement that the common boundary was the Lewis Fence Line. The parties have
12 unconditionally agreed on the physical location of the fence line, and a licensed
13 surveyor has documented its legal description. The Croonenberghs, through their
14 counsel, are unreasonably refusing to carry out the terms of the agreement, and
15 repeatedly insisting on quitclaim deed language that would again embroil the parties
16 in boundary litigation. As a result of Mr. Tipp's unreasonable and vexatious conduct,
17 the Kohlers have unnecessarily incurred additional surveyor and attorney fees. Under
18 *Bayer*, the Kohlers are entitled to an award of fees and costs from Mr. Tipp for his
19 unreasonable and vexatious conduct.
20
21
22
23

24 CONCLUSION

25 For the foregoing reasons, the Kohlers respectfully request that the
26 Court grant their Motion to Enforce Settlement Agreement and enter the Proposed
27 Order submitted with their motion. In addition, the Kohlers respectfully request that

1 the Court award them their attorneys' fees and costs incurred as a result of the
2 unreasonable and vexatious conduct of Croonenberghs' counsel, and that the Court
3 hold a hearing to determine the reasonable costs and attorneys' fees that should be
4 awarded to the Kohlers.
5

6 DATED this _____ day of January, 2005.
7

8 _____
9 *Attorney for Plaintiffs*

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that a copy of the above and foregoing MOTION TO
12 ENFORCE SETTLEMENT AGREEMENT was served by United States First Class
13 Mail upon the following this _____ day of January 2005:

14 Raymond P. Tipp
15 Tipp & Buley, P.C.
16 P.O. Box 3778
Missoula, MT 59806-3778
Attorney for Defendants Croonenberghs

17 Gregory G. Schultz
18 LAW OFFICES OF GREGORY SCHULTZ, P.C.
19 210 E. Pine St. Suite 200
20 Missoula, Montana 59802
Attorneys for Commonwealth Land and Title Insurance

21 Gary L. Graham
22 GARLINGTON, LOHN & ROBINSON, PLLP
23 199 W. Pine
24 PO Box 7909
25 Missoula, Montana 59807-7909
Attorneys for Lambros Real Estate
26
27